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No. 05-1569

IN THE

Supreme Court of the United States

ALAN DeATLEY, *et ux.*,

Petitioners,

v.

LYNN BARNETT, *et vir.*, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION III

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioners have mischaracterized the context in which the trial court exercised its discretion to apply judicial estoppel to dismiss the DeAtleys' lawsuit. The context in which the trial court made its decision is corrected in respondents' Introduction and Clarification of Issues Presented Below and the Statement of the Case supported by citations to the record. When the case is reviewed in the proper context, the questions that are presented to this Court are as follows:

1. Should a bankruptcy debtor be allowed to omit from its schedules the secret assignment of a contract to a closely held corporation, gain a discharge of debtor's obligations under the contract, quietly reassign the same contract from the closely held corporation back to debtor, and then sue the discharged contract creditor for breach of the contract?

A. Did the trial court properly exercise its discretion to apply judicial estoppel to dismiss petitioners' lawsuit to enforce a contract, where, in a prior bankruptcy proceeding, petitioners had their obligations under the same contract discharged without disclosing on the bankruptcy schedules a prior assignment of the contract that petitioners would employ in the subsequent lawsuit to claim the contract obligations survived the bankruptcy discharge?

B. Does a bankruptcy debtor whose contract rights and obligations are publicly discharged, lack standing to sue under that same contract if debtor failed to list an assignment as an asset on

debtor's bankruptcy schedules when that assignment purportedly preserved the otherwise discharged contract rights and obligations?

2. Have petitioners presented a compelling reason for United States Supreme Court review, since the Washington appellate courts' affirmed a trial court's exercise of discretion in equity based upon unique factual circumstances and their decisions do not create a conflict between Washington State and federal law?

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INTRODUCTION AND CLARIFICATION OF ISSUES PRESENTED BELOW

Critical to resolving this request for U.S. Supreme Court review is a correct understanding of the circumstances that led to the trial court's decision to exercise its discretion to invoke the doctrine of judicial estoppel. The facts asserted by petitioners are not the facts at issue, nor are they the facts that support the lower courts' consistent dismissal of the DeAtleys' lawsuit. Petitioners incorrectly assert that the lower courts applied judicial estoppel to dismiss their lawsuit on the sole basis that the DeAtleys failed to exhaustively list the assets of their closely held corporation in their personal bankruptcy schedules. That was not the basis for dismissal.

The decision to dismiss was confirmed by three Washington courts below because the DeAtleys beneficially invoked the powers of the bankruptcy court to obtain a discharge of personal contract obligations without also disclosing a *personally* held asset. The personal asset the DeAtleys failed to disclose was a purported assignment to their closely held corporation of all rights and obligations under that contract from which their personal obligations were discharged. But for dismissal by the Washington courts, the DeAtleys' discharge of personal obligations, without disclosing that those same obligations and contract benefits were assigned to their closely held corporation, would have caused the discharged creditor's contract obligations to survive the bankruptcy, unbeknownst to the creditor or the bankruptcy court and contrary to the normal consequence of a discharge.

More specifically, in their sworn bankruptcy schedules, the DeAlteys disclosed to all creditors that they were discharging their sole obligation under the 1988 Agreement with Barnett, the obligation to construct a road. Under the

bankruptcy laws, Barnett was thereafter prohibited from enforcing his rights under the 1988 Agreement against the DeAtleys. Based upon the sworn schedules and the subsequent discharge, Barnett was entitled to conclude that his own remaining obligations under the 1988 Agreement, if any, were also discharged.[1] The DeAtleys did not disclose in the bankruptcy that, in secret, they purportedly took action to assign both their obligation and their remaining rights under the 1988 Agreement to their closely held corporation, AD3 Company. The DeAtleys thus attempted to surreptitiously preserve a contract right they later would assert personally (a right of first refusal) that would otherwise have been eliminated by the bankruptcy.

If the assignment was valid, unbeknownst to Barnett, his remaining rights and obligations (if any) survived the bankruptcy because of the purported transfer to AD3 Company. As a result of the incomplete disclosure on the sworn schedules, however, all that Barnett could know was that his rights under the 1988 Agreement had been fully discharged. Because the assignment was not disclosed, Barnett had no basis to conclude that he could enforce his rights under the 1988 Agreement against the purported assignee AD3 Company. Instead, the secret assignment would only be revealed to Barnett should the DeAtleys unilaterally elect to do so in order to attempt enforcement of alleged remaining rights under the 1988 Agreement.

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1. It is undisputed in Washington law that if a debtor's obligations under a contract are discharged, then the creditor's obligations under the same contract are also discharged. *Puget Sound Nat'l Bank v. Ferguson*, 102 Wn. App. 400, 7 P.3d 822 (2000). In this case, for example, since appellant's obligation to build the road was discharged, Barnett's obligation to offer a first right of refusal would also have been discharged.

In fact, that is precisely what occurred in this case. The DeAtleys did not disclose the assignment when it was purportedly executed in 1990. They did not disclose the assignment in their bankruptcy schedules in 1992. They did not disclose the assignment when they commenced this lawsuit on the 1988 Agreement in 1997. They did not disclose the assignment in response to a 1998 discovery request seeking all documents, including agreements, related to the 1988 Agreement. It was not until 2003, when respondents sought to dismiss the lawsuit based upon the bankruptcy discharge, that the DeAtleys finally disclosed the purported assignment. Their disclosure came too late.

The trial court, supported by two Washington appellate courts, correctly concluded that the DeAtleys' incomplete and misleading disclosure in the bankruptcy proceeding necessitated application of judicial estoppel. The DeAtleys could not purport to discharge their obligations under the 1988 Agreement in one court, and then sue on the same contract in another court by relying upon an undisclosed assignment that purportedly preserved the obligations otherwise publicly discharged in bankruptcy. The DeAlteys' secret assignment constituted an asset for which disclosure on the bankruptcy schedules was required. Their failure to disclose the purported assignment of the 1988 Agreement is the reason the DeAtleys were not permitted to sue Barnett in state court to enforce the 1988 Agreement.

Petitioners' attempt to recast the context of the trial court's dismissal as one that mandated disclosure of all AD3 Company's assets is contrary to the record. Once the assignment was finally disclosed, respondents consistently presented a singular argument to the court: The law and principles of equity mandated public disclosure of the *assignment in the bankruptcy proceeding*. The argument was consistently presented under both standing and judicial estoppel theories. The issue was never whether the DeAtleys had a duty to disclose all assets of their

closely held corporation. The issue was whether the DeAtleys had a duty to disclose the assignment, an asset the DeAtleys held personally and a document necessary to fully understand the consequences of the bankruptcy discharge. As respondents stated to the trial court in response to the DeAtleys' motion for reconsideration of the dismissal:

> Defendants moved for dismissal on the theory that the DeAtleys failed to list the 1988 Agreement and the right of first refusal as an asset in their 1992 bankruptcy. In defense of the motion, Alan DeAtley produced, for the first time ever, an assignment agreement dated January 1990, purporting to assign the DeAtleys' interests in the 1988 agreement to their corporation, the AD3 Company. The Court granted defendants' motion and dismissed the action. On reconsideration, the DeAtleys' sole argument is that the right of first refusal was an asset of AD3 Company and as a result, it did not have to be listed as an asset. But, in any event, the DeAtleys' bankruptcy lawyer did discuss the existence of the first right of refusal with the bankruptcy trustee. Plaintiffs have missed the point.
>
> With the revelation of the alleged assignment, the focus of concern has shifted. If the assignment is valid, then the fact that the right of first refusal was not identified as an asset is of lesser consequence. As plaintiffs argue, the right of first refusal would have been an asset of the AD3 Company. But, and most significantly, the assignment itself was an asset of the DeAtleys' personal estate and the assignment had to be listed as an asset in the DeAtleys' personal bankruptcy. The undisputed failure of the DeAtleys to list the alleged assignment in their bankruptcy estate is fatal to their claims in this action, which

> are now, wholly dependent upon the validity of the alleged assignment.

(Clerks Papers ("CP") 106-07.)

In this context, the trial court properly exercised his discretion to invoke the equitable doctrine of judicial estoppel to stop the DeAtleys' misuse of the judicial system. Division III of the Washington Court of Appeals and the Washington State Supreme Court properly deferred to and sustained the trial court's discretion. This Court should similarly sustain the trial court's discretionary ruling by denying the DeAtleys' request for U.S. Supreme Court review.

STATEMENT OF THE CASE

The facts giving rise to this case span a decade. The accuracy of the lower court decisions rest on the correction of the record presented by petitioners with respect to several facts. Unlike petitioners, respondents support their statement of facts with citations to the record before the lower courts.

1. *The 1988 Agreement between Barnett and DeAtley.* In 1988, petitioners DeAtley agreed to build a road for respondent Barnett in exchange for 86 acres of land (the "1988 Agreement"). (CP 1407-11.) Ancillary to this primary agreement, Barnett also agreed, in the same contract, to give the DeAtleys a first right of refusal on approximately 400 acres of adjoining land. (*Id.*) As promised, Barnett performed his primary obligation and conveyed 86 acres of land, free and clear of any encumbrances. (CP 1272.) DeAtley, on the other hand, performed less than half of the road construction contemplated under the contract. (CP 1242, 1296.) As to the first refusal, it is respondents' position that the right was never triggered and that it is no longer a viable right.[2]

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2. Petitioners state at page 3 of the Petition that "it is undisputed" that DeAtleys did not know during the bankruptcy that the first refusal rights were exercisable, or that Barnett had breached the parties' contract. (Cont'd)

2. *The DeAtleys discharged their unfulfilled 1988 Agreement obligations in bankruptcy.*

In their 1992 bankruptcy, petitioners took all measures necessary to discharge their obligation to build the road. The DeAtleys identified Barnett as a creditor[3] in Schedule F (which identifies unsecured debts sought to be discharged).[4]

(Cont'd)

This is not true. Respondents presented testimony that the DeAtleys were aware, before they filed bankruptcy, that the property was held by a partnership and that Barnett was in the process of changing the composition of the partnership. In fact DeAtley engaged in negotiations with Barnett's partner. (CP 621-44; 661-64.) Respondents have also consistently disputed both that the first refusal was triggered and that the 1988 Agreement was breached.

3. Barnett did not appear or directly participate in the bankruptcy proceeding or even retain a copy of the notice in his files. Quite frankly, he has only a limited recollection of DeAtley's bankruptcy. Both Barnett and his administrative assistant have a vague recollection of receiving the notice. It is not atypical for Barnett to receive bankruptcy notices, since his business includes the sale of real property to individuals on real estate contracts. Any time one of those buyers or their assignees files a bankruptcy petition, Barnett receives a notice. He typically has no reason to participate in the bankruptcy proceeding, however, since his receivables are adequately secured through the real estate contract. (CP 518-19; 527-28; 181-82.) Presumably, Barnett did not feel compelled to directly participate in the bankruptcy because DeAtley had already abandoned the road construction efforts and Barnett had already performed by conveying the 86 acres, thus effectively terminating the 1988 Agreement. (*Id.*)

4. Schedule F said, in relevant part:

Creditor Name and Address	Date Claim was Incurred Consideration for Claim	Claim Amount And Notes*
	* * *	
29. Lynn Barnett 3020 S. Union Tacoma, WA 98409	6/1/89 Traded work for land	$50,000.00 *Joint Debt

(CP 475.)

Schedules and notices were accompanied by the bankruptcy court's instruction that any attempt to enforce listed obligations while the bankruptcy was pending would violate the stay protections provided by federal law. (CP 456.)

Ultimately, this listed 1988 Agreement obligation was discharged. (CP 510.) Petitioner's assert at page 3 of their Petition that "[a]t no point during the bankruptcy and at no point post-bankruptcy did DeAtleys ever claim the DeAtley Agreement had terminated or that Barnetts or AD3's contract rights as against each other were in any way effected (sic) by DeAtleys' bankruptcy." Of course this statement naively ignores the undeniable facts that Barnett had no knowledge that he had any rights against AD3, and that, following the discharge, creditors were strictly admonished that any attempt to collect or enforce listed obligations against the DeAtleys would constitute violation of a federal court order thereby subjecting the creditor to contempt of court charges. (CP 456, 510.)

3. *Barnett had no notice of the purported assignment.* The survival of the DeAtleys' lawsuit rests on the notion that, prior to the bankruptcy, petitioners' discharged obligation was assigned to their wholly owned corporation, AD3. Petitioners believe that the assignment served to quarantine the 1988 Agreement from the effects of bankruptcy, until remaining rights under the 1988 Agreement could later be quietly reassumed by petitioners. The assignment was purportedly accomplished through the January 1990 execution of a handwritten document that provides in total:

> I Alan DeAtley, am assigning the contract agreement between Alan & Debra DeAtley and Lynn and Marlene Barnett dated 1988 Land 86 ac / work / roadway to AD3 Company along with all

> rights that are with in the contract, AD3 Company will furnish all parts that may be left owing to Barnett (Roadway wise).

(CP 311.)[5] Alan DeAtley signed the document on his own behalf, as well as on behalf of the community. Debra DeAtley did not sign the document. Notably, in an unconcluded divorce proceeding that occurred prior to the bankruptcy, Ms. DeAtley advised the court under oath that Mr. DeAtley had been transferring assets without her consent. (CP 261-66.) Also noticeably absent is a signature on behalf of AD3 Company accepting the obligation to build the road.[6]

Significantly, Barnett testified that this assignment was never disclosed to him and that he was wholly unaware of it until the DeAtleys filed their pleadings opposing the motion to dismiss on November 12, 2003, one day before the motion to dismiss was heard and five days before the first day of trial. (CP 180-81.) The assignment was not signed or accepted by Lynn Barnett. (CP 311.) DeAtley never testified that he advised Barnett of the assignment, and he acknowledged that he took no action to obtain Barnett's consent. (CP 301.) Though the assignment document is now critical to the DeAtleys' lawsuit, it is not mentioned in DeAtleys' complaint. (CP 1460-62.) The DeAtleys also failed to produce the assignment in response to a 1998 discovery request seeking all documents, including agreements, related to the 1988 Agreement. (CP 17, 25-26.) They also failed to produce

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5. A copy of the handwritten assignment is attached as Appendix A to this response brief.

6. An assignee of an executory contract is not liable on the underlying obligation absent an express assumption of those obligations. *Lewis v. Boehm*, 89 Wn. App. 103, 107, 947 P.2d 1265 (1997).

the assignment in response to subsequent discovery requests to which the assignment was responsive. (CP 170-71.)[7]

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7. The DeAtleys do not assert in their Petition that Barnett had knowledge of the assignment; though at every level below, they asserted that Barnett knew that their personal obligation to build the road had been assigned to AD3. There is no evidence in the record to support the assertion. It is anticipated that the DeAtleys may make this claim in their reply. Though this footnote is lengthy, respondents feel compelled to address the issue here in anticipation that argument will be presented in the DeAtleys' reply.

The only "evidence" the DeAtleys' have presented to support their claim of knowledge is that Barnett had available to him documents that disclosed that the 86 acres of land had been transferred to AD3. The DeAtleys have argued that, if Barnett knew that the 86 acres had been transferred to AD3, Barnett would necessarily conclude on his own, without any affirmative disclosure, that any remaining rights under the 1988 Agreement were also transferred to AD3. This contrived argument that Barnett necessarily had knowledge of a purported assignment of the road building obligation is not only without support from the record, it is unsupported by logic.

Of course, once title to the property was conveyed to the DeAtleys, it was theirs to do with as they pleased. Other obligations or rights under the 1988 Agreement were not tied to title to the 86 acres. The DeAtleys could assign the land to their wholly owned corporation, build on it, sell it to an unrelated third party or do whatever they wished with it. Separately and in addition, they had a personal obligation to build the road. The fact that they may or may not have continued to own the land had nothing to do with that obligation. Notably, the DeAtleys later transferred title to the property to another corporation, Napi, LLC, in 1993. They did not, however, correspondingly assign their rights under the 1988 Agreement to Napi, LLC. Clearly, the obligation to build the road did not automatically follow title to the 86 acres. Petitioners do not and cannot point to any evidence in the record showing that Barnett knew

(Cont'd)

The DeAtleys also did not disclose the assignment in any of their publicly filed schedules. The DeAtleys only made two disclosures in their initial bankruptcy schedules that relate to the 1988 Agreement or to the AD3 Company. The first and most direct disclosure was in the Schedule F, where they stated their intent to discharge themselves of the road building obligations under the 1988 Agreement. (CP 475.) There was no notation or statement advising Barnett, the creditor being discharged, that the obligation was purportedly preserved to another party via an assignment. Likewise, the assignment was not listed on the DeAtleys' schedule of assets, even though it was an asset that effectively reduced DeAtleys' total unsecured debt. (*See* CP 464-66; *see also* CP 503-05.)

With respect to AD3 Company, petitioners merely disclosed that they owned stock in Wildones, Inc. dba AD3 Company and that the stock has no value. (CP 326.) These two disclosures represented the full extent of the public information that was available to Barnett when he received notice of petitioners' 1992 bankruptcy. This information, of

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(Cont'd)

or had reason to know that the road building obligation had been assigned to AD3.

As a final note on this issue, following the purported assignment, petitioners actions were inconsistent with the assignment having been made and did nothing to put Barnett on notice of the claimed assignment. For example, DeAtley allegedly wrote two letters to Barnett. One of the letters was purportedly sent December 16, 1990 and the other on February 2, 1991. Significantly, the alleged assignment was signed January 1990. Neither of the letters makes any reference whatsoever to the alleged assignment. Neither makes any reference to the AD3 Company or the fact that the AD3 Company would be building the road. To the contrary, the letters were written on letterhead for Superior Concrete Company and Alan DeAtley, Joint Ventures. (*See* CP 307, 309.)

course, was accompanied by the strict admonishment from the bankruptcy court that any attempt to enforce the 1988 Agreement obligations against DeAtley would violate federal law. (CP 456.)

The DeAtleys later amended their schedules and publicly provided some additional information regarding AD3 Company. Petitioners disclosed that DeAtley was the President and Vice President of AD3 and that his wife was Secretary/Treasurer. (CP 348.) He also made the following disclosure with respect to transfers to AD3 Company:

> DeAtly transferred to Wildones, Inc. d/b/a AD3 certain deeds on house, subdivision with lots, *86 acres of open land*, and real estate contract which came from the sale of lots of the subdivision, which deeds were executed a year ago but not recorded until fall of 1991. There is no equity in property and it is in mortgage to U.S. National Bank. (Emphasis added)

(CP 347.) Once again, there was no indication that any remaining benefits under the 1988 Agreement, namely the first refusal right, were assigned to AD3. Likewise there was no indication that DeAtley's remaining road-building obligations under the 1988 Agreement were assigned to AD3. This assignment would, of course, be an asset to the DeAtleys' personally, since it would decrease their debts owed and correspondingly increase the assets available for distribution to other creditors.

4. *Any disclosure to the trustee regarding the assignment was not a public disclosure.*

Petitioners claim that they disclosed the assignment of both their road-building obligations and their first refusal rights to the Trustee. None of these purported disclosures,

however, were made publicly so as to allow creditors the benefit of the disclosure. Petitioners failed to make any public disclosure of the assignment in the bankruptcy proceeding, either as an asset or otherwise.

Petitioners allege that "DeAtleys' bankruptcy lawyer confirmed that she specifically discussed the DeAtley Agreement first refusal rights and AD3 Company obligations under the DeAtley Agreement with the bankruptcy trustee." (Petition for Review at 2.) However, the bankruptcy lawyer's testimony on this issue actually leads to the inference that disclosures concerning the assignment were made in closed-door conversations involving only the debtor's lawyer and the trustee. (*See* CP 198-200.)

The Notice to Creditors instructed Barnett that, if he wanted information, he could obtain it by reviewing the court file. (CP 456.) A certified copy of the entire bankruptcy court file was presented to the trial court. The critical disclosure of the assignment is nowhere to be found in the sworn schedules or anywhere else in the bankruptcy court file. The closed door discussions, if they occurred, certainly did not provide notice of the assignment or afford Barnett or the bankruptcy court an opportunity to make informed decisions on issues impacted by the assignment.

Through the bankruptcy court proceeding, the DeAlteys successfully discharged their obligations under the 1988 Agreement. The bankruptcy court told Barnett that he had no ongoing claim against the DeAtleys and any effort on his part to collect the road building obligation would be a violation of federal law. (CP 456, 510.) Having obtained the benefit of bankruptcy protection by taking the public position (through omission) that there had been no assignment of the debt to Barnett, it would be patently wrong to now allow the DeAtleys to maintain this lawsuit based on the premise that

there had been an assignment. That was the successful argument to each of the courts below. Discussions that may or may not have occurred, off the record, between petitioners' lawyer and the bankruptcy trustee could not have put Barnett or the bankruptcy court on notice of the assignment and thus, those discussions do not satisfy the bankruptcy requirement to publicly disclose all assets. Dismissal by the Washington courts was squarely in line with this bedrock principal of bankruptcy law and the doctrine of fairness implicit in judicial estoppel.

ARGUMENT

A. The Trial Court's Dismissal Rested On Judicial Estoppel And A Trial Court's Application Of Judicial Estoppel Is Reviewed For Abuse Of Discretion Only.

The trial court held that, under the facts of this case, the DeAtleys' lawsuit is barred by the doctrine of judicial estoppel.[8] Under Washington law, courts review a trial court's application of judicial estoppel for abuse of discretion. *Garrett v. Morgan*, 127 Wn.2d 375, 378-79, 112 P.3d 531 (2005); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 227, 108 P.3d 147 (2005). The majority of the federal circuit courts also apply the abuse of discretion standard. *See, Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 30-31 (1st Cir. 2004); *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616-17 (3rd Cir. 1996); *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1046 (8th Cir. 2006); *United States v. Garcia*, 37 F.3d 1359, 1367 (9th Cir. 1994); *Talavara*

8. Division III of the Washington Court of Appeals affirmed the dismissal based on judicial estoppel. Independently, Division III held that the dismissal could be sustained on the basis that the DeAtleys' failure to disclose stripped them of standing to sue under the 1988 Agreement.

v. School Board, 129 F.3d 1214, 1216 (11th Cir. 1997); *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996). The abuse of discretion standard is applied because the trial court's first hand observations make it better suited to make the subjective determination of "whether a litigant is playing fast and loose with the courts." *Alternative Sys. Concepts*, 374 F.3d at 31. The abuse of discretion standard is applied even if judicial estoppel was applied in a summary proceeding. *Id.*; *Stallings*, 447 F.3d at 1046.

Under Washington law, a trial court abuses its discretion when it bases its decision on untenable grounds. *Garrett*, 127 Wn.2d at 379. Federal courts will overturn a trial court's decision for abuse of discretion only if it appears plainly to the reviewing court that the court committed "a clear error of judgment in the conclusion it reached upon weighing the proper factors." *Alternative Sys. Concepts, Inc.*, 374 F.3d at 32. The standard is deferential and the reviewing court is obligated "not to substitute its judgment for that of the [trial court]." *Id. quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

Petitioners have not presented compelling reasons for this Court to accept review and interfere with the trial court's exercise of discretion in this case.

1. The Washington Courts correctly applied judicial estoppel law to the undisputed facts to bar the DeAtleys' lawsuit on the 1988 Agreement.

Petitioners argue that the Washington courts failed to correctly apply state or federal judicial estoppel law. Again, they ignore the fact that petitioners failed to publicly disclose in the bankruptcy proceeding the secret assignment that surreptitiously preserved a claim against Barnett while publicly discharging Barnetts' contractual right to collect.

"A court may invoke judicial estoppel either to prevent a party from gaining an advantage by taking different positions or to maintain the dignity of judicial proceedings." *Garrett v. Morgan*, 127 Wn. App 375, 379, 112 P.3d 531 (2005); *See also, Cunningham v. Reliable Concrete*, 126 Wn. App. at 224; *Johnson v. Si-Cor Inc.*, 107 Wn. App 902, 906, 28 P.3d 832 (2001). In deciding whether to apply judicial estoppel, courts will consider three factors: (1) whether the party's later position clearly conflicts with its earlier one; (2) whether the party persuaded a court to accept its earlier position such that its acceptance of an inconsistent position in a later proceeding creates the perception that the party misled either the first or second court; and (3) whether the party derives an unfair advantage over or imposes an unfair detriment on the opposing party if not estopped. *Id., citing New Hampshire v. Maine*, 532 U.S. 742, 752-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001).

The requisite elements for judicial estoppel are all present in this case and the Washington Courts correctly concluded that the DeAtleys' lawsuit to enforce the first refusal right is now barred. The DeAtleys disclosures that led to the 1992 bankruptcy discharge are inconsistent with the position they take in this lawsuit. In the bankruptcy court, the DeAtleys disclosed their road-building obligation under the 1988 Agreement for the purpose of communicating to all creditors (including Barnett) that they intended the obligation to be *discharged*. In this lawsuit, they belatedly disclosed the assignment of the 1988 Agreement asserting that the road-building obligation and the corresponding first refusal right *survived* the bankruptcy discharge. The DeAtleys' position in this lawsuit – that the road building obligation survived the bankruptcy and they continue to retain the first refusal right – is undeniably inconsistent with the public disclosures

in the bankruptcy that ultimately afforded the DeAtleys the benefit of discharge from the obligation.

Judicial estoppel precludes this inconsistent claim that Barnett remains obligated on a contract for which the DeAtleys were discharged from performing the obligation constituting the sole consideration that Barnett would receive under the contract. *Accord*, *Puget Sound Nat'l Bank v. Ferguson*, 102 Wn. App. 400, 402-03, 7 P.3d 822 (2000)(debtor could not pursue lender liability claim after discharging loan obligation in chapter 7 bankruptcy without disclosing offsetting lender liability claim).

2. DeAtley's purported oral disclosures do not cure the inconsistent written disclosures filed with the bankruptcy court.

Even though no reference to the purported assignment of the 1988 Agreement appears on any of the bankruptcy schedules, DeAtley claims that the private oral discussions between his lawyer and the trustee constitute disclosure. DeAtley's private oral disclosures to his bankruptcy attorney and his attorney's private oral disclosure to the trustee, even if accepted as true, do not save the DeAtleys from application of judicial estoppel. *Cunningham v. Reliable Concrete Pumping*, *supra*, a Washington case that relied on federal precedent, is dispositive.

Like here, the plaintiff in *Cunningham* challenged a summary dismissal by arguing that the record supported a finding of disclosure in the bankruptcy proceeding because the plaintiff orally disclosed a later-asserted, but previously accrued, personal injury cause of action at a creditors' meeting and in a post-petition letter. The plaintiff thereafter asserted that, because there was an oral disclosure, the requisite element of an inconsistent position could not be

satisfied. *Cunningham*, 126 Wn. App. at 226. There was conflicting evidence in the record as to whether the oral disclosure actually occurred, however, the court appropriately accepted the oral disclosure as true on summary judgment. Nonetheless, the *Cunningham* court rejected plaintiff's argument.

> The question is whether anything short of listing the claim in the bankruptcy schedules is sufficient to avoid the effect of judicial estoppel. We conclude that under the facts of this case, the failure to list the claim in the bankruptcy schedules fulfills the first criterion of judicial estoppel. The Bankruptcy Code and court rules "impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, including contingent and unliquidated claims.

Cunningham, 126 Wn. App. at 229-30.[9]

Cunningham's holding is consistent with the oft repeated policy that the "importance of this disclosure cannot be overemphasized." *In re Coastal Plains, Inc. v. Mims*, 179 F.3d 197, 208 (5th Cir. 1999).

> The rationale for . . . decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting

9. Previously, petitioners attempted to avoid *Cunningham* by arguing that it has no application since it addressed a known personal injury claim that arose before bankruptcy. The factual distinction does not lessen the impact of the ruling on this case. The holding in *Cunningham* that private disclosures will not serve to satisfy the duty to publicly disclose information on the requisite bankruptcy schedules and that discharge will be deemed as court acceptance of the information disclosed on the schedules is not restricted to personal injury claims.

> that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets*. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.*

Id., quoting, Rosenshein v. Kleban, 918 F. Supp. 98, 104 (S.D.N.Y. 1996) (Italics in original).[10]

Petitioners attempt to avoid these clear holdings by relying on *In re Bargar*, 279 B.R. 900 (Bkrtcy. N.D. Ga. 2002) for the proposition that if a debtor orally discloses unlisted assets to his own attorney or at the creditor's meeting, then there is no harm in debtor's lawyer's failure to amend the schedules and list the assets. Petitioners' reliance is misplaced, however, since the Eleventh Circuit overturned *Bargar*. *Bargar v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003).

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10. Complete disclosure is equally important in chapter 7 bankruptcies as well, as creditors rely on a debtor's disclosure statements in determining whether to contest or consent to no asset discharge. Bankruptcy courts also rely on the accuracy of the disclosure statements when considering whether to approve a no asset discharge. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002)(citations omitted).

The Eleventh Circuit applied an analysis similar to that applied by the Washington court in *Cunningham*. The court held that oral disclosures to the debtors' attorney or the trustee will not relieve the debtor of his obligation to publicly disclose all assets on the mandatory schedules.

> Although it is undisputed that Barger's attorney failed to list Barger's discrimination suit on the schedule of assets despite the fact that Barger specifically told him about the suit, the attorney's omission is no panacea. As the Supreme Court stated in *Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1386, 8 L. Ed. 2d 734 (1962)*, "there is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Link v. Wabash R.R. Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1386, 8 L. Ed. 2d 734 (1962)*. "If an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant."

Id. at 1295.

> The failure to comply with the Bankruptcy Code's disclosure duty is "inadvertent" only when a party

> either lacks knowledge of the undisclosed claim or has no motive for their concealment.

Id. Whether there is motive to conceal or intentional manipulation may be inferred from the record. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1287 (11th Cir. 2002).

In reversing *Bargar*, the Eleventh Circuit found support in two other federal cases where debtors failed to make written disclosure of all assets. In those cases, the courts concluded that there exists a motivation to conceal the assets from the bankruptcy court to shield assets from distribution to creditors, even if the assets are only contingent at the time of the bankruptcy. In both cases, intentional manipulation was inferred from the record.

> Moreover, the Court also found that the debtor stood to gain an advantage by concealing his discrimination claims from the bankruptcy court. *Id. at 1288.* It was "unlikely [the debtor] would have received the benefit of a conversion to Chapter 7 followed by a no asset, complete discharge had his creditors, the trustee, or the bankruptcy court known of a lawsuit claiming millions of dollars in damages."

Bargar v. City of Cartersville, 348 F.3d at 1294 citing *Burnes v. Pemco Aeroplex, Inc., supra.*

> The court found that Coastal both knew of the facts giving rise to the inconsistent positions and had a motive to conceal the claims. *In re Coastal Plains, 179 F.3d at 212* (noting that had the claims, believed to be worth over $ 10 million, been disclosed, Coastal's unsecured creditors might have opposed lifting the stay, and the

> bankruptcy court might have reached a different decision).

Bargar v. City of Cartersville, 348 F.3d at 1296 citing *In re Coastal Plains, 179 F.3d 197(5th Cir. 1999).*

In *Bargar*, the court also inferred intentional manipulation from the record.

> Barger appeared to gain an advantage when she failed to list her discrimination claims on her schedule of assets. Omitting the discrimination claims from the schedule of assets appeared to benefit her because, by omitting the claims, she could keep any proceeds for herself and not have them become part of the bankruptcy estate. Thus, Barger's knowledge of her discrimination claims and motive to conceal them are sufficient evidence from which to infer her intentional manipulation. See *Burnes at 1287.*
>
> The fact that Barger informed the trustee about her discrimination suit during the creditor's meeting does not aid her cause.
>
> . . .
>
> The foremost responsibility in this matter was for Barger to fully disclose her assets. She did not satisfy her duty. Instead, she dissembled to the trustee and indicated that her discrimination claim had no monetary value. As such, the trustee can hardly be faulted for not further investigating Barger's discrimination suit.

Bargar v. City of Cartersville, 348 F.3d at 1296.

Ultimately, based upon the debtors' disclosure failures in the bankruptcy proceeding, the Eleventh Circuit affirmed the trial court's application of judicial estoppel to a subsequent lawsuit on the undisclosed asset. *Id.* at. 1297. *Accord, In re Superior Crewboats, Inc.* 374 F.3d 330, 333 (5th Cir. 2004)(Allowing debtors to sue on undisclosed assets "allows these debtors to have their cake and eat it too, as they retain the enormous benefit of a bankruptcy discharge while standing in line to receive funds from the injury lawsuit after the creditors are paid . . . judicial estoppel is designed to prevent such guile.")

In this case, the DeAtleys clearly had knowledge of the assignment. They elected not to disclose it, knowing that their bankruptcy schedules would cause a creditor and bankruptcy court, unaware of the assignment, to conclude that all remaining creditor obligations under the 1988 Agreement would be discharged simultaneously with the bankruptcy discharge of the debtors' road building obligations. Exercising its discretion, the trial court was certainly justified in inferring a motivation for the DeAtleys to conceal the assignment.

Following the discharge, federal law barred Barnett from taking any action to enforce the road-building obligation under the 1988 Agreement. Barnett could not enforce the obligation against AD3 pursuant to the assignment so long as he remained unaware of the assignment's existence. Moreover, after the 1988 Agreement was quietly reassigned to the DeAtleys personally, Barnett remained unaware that he had any right to enforce the road building obligations against the DeAtleys.

In contrast to Barnetts' understanding that the 1988 Agreement was effectively terminated by the bankruptcy, the DeAtleys knew that they retained the option to use the

undisclosed assignment to attempt to enforce the first refusal rights afforded under the 1988 Agreement. The DeAtleys now ask the Court to allow them to use the undisclosed assignment to revive the 1988 Agreement and sue respondents for millions of dollars.

Even if one accepts DeAtley's claim that his attorney told the trustee about the assignment, it does not create a factual dispute as to the adequacy of the disclosure. The trial court appropriately exercised its discretion to apply the doctrine of judicial estoppel to summarily dismiss this action. The court did not abuse its discretion and this Court should deny review.

B. To Preserve Any Right To Assert Their First Refusal Claim Under The 1988 Agreement, The DeAtleys Were Required To Disclose The Alleged Assignment TO AD3.

Petitioners' claim rests solely on the notion that an individual debtor is only obligated to disclose his stock interest in a non-debtor corporation; he is generally not required to disclose the assets of the non-debtor corporation. Petitioners cite case after case for that general proposition and, on that point, there is no apparent dispute among the Circuits. Again, petitioners miss the point.

The asset that DeAtley failed to disclose is not an asset belonging to the closely held corporation, it is an asset belonging to the DeAtleys personally. The unreported asset is the purported assignment of the remaining obligations and benefits under the 1988 Agreement from DeAtley to AD3. This assignment (this asset) purportedly relieved petitioners of a road-building obligation equated to a $50,000 debt. It was also an asset that was intended to keep alive a first refusal right.

The assignment itself was an asset held by petitioners personally which was relevant to creditors evaluating their options in the bankruptcy proceeding and for which disclosure was mandated. This asset was never revealed in petitioners' personal bankruptcy pleadings and it was the failure to list this asset that demands dismissal of this action.

Under Washington law, an assignment is an asset that the debtor has a duty to disclose, regardless of whether any cause of action that might arise from the assignment actually accrued at the time of bankruptcy. As the court held in *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180 (1991).

> [E]ven if a cause of action based on the assignment had not accrued before the bankruptcy petition was filed, *the assignment itself* was an asset which existed at the commencement of the bankruptcy case.

Id. at 185 (emphasis added).

The purported assignment of the remaining obligations and benefits under the 1988 Agreement is the same. Petitioners cannot claim that the assignment of the 1988 Agreement saved the agreement from complete discharge without disclosing the assignment in the same bankruptcy in which DeAtley, in fact, obtained a discharge of his obligations under that agreement.

"It goes with out saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets." *In re Coastal Plains, Inc. v. Mims*, 179 F.3d 197, 207-08 (5th Cir. 1999) *citing* 11 U.S.C. § 521(1). It is the initial information disclosed in the schedules upon which creditors rely and make decisions. *In re Coastal Plains, Inc. v. Mims*, 179 F.3d at 208. "Any claim with potential must be disclosed, even if it 'is

contingent, dependent, or conditional.'" *Id.* at 208 (citations omitted).

Petitioners entire Petition is a red herring. The DeAtleys' fatal error was not a failure to list the assets of their closely held corporation. It was a failure to list the assignment, an asset personal to them, that relieved them of debt and preserved a future, contingent claim.

The cases cited by petitioners do not challenge this conclusion. For example, petitioners cite to *In re Walker*, 198 B.R. 476 (Bankr. E.D. Va. 1996) and quote the following language:

> A debtor cannot be expected to unerringly predict the future, but rather must provide information on all factors known to him at the time that bear upon the success or failure of the proposals set forth in the plan.

Petitioners did not do that. Petitioners failed to provide information on a significant factor – a factor designed to relieve the DeAtleys of personal debt and to preserve a future, contingent claim to them personally. That factor was their assignment and failure to disclose the assignment was fatal. The balance of the cases cited by petitioners were cited for the sole purpose of asserting that the assets of a closely held corporation did not have to be listed in a personal bankruptcy. For all of the reasons set forth in this brief, those cases are not germane to the basis of dismissal imposed by Washington courts.

C. Preservation of issues undecided by the court of appeals.

There were several issues that were presented to the Washington Court of Appeals in the underlying appeal and cross appeal. Included in the issues presented in respondents'

cross appeal were whether (i) the right of first refusal was ever triggered; and (ii) Barnett was relieved of any obligations related to the right of first refusal when DeAtley failed to complete construction of the road by 1991. Those issues were not decided by the Court of Appeals, however, because the issues were rendered moot when the Court of Appeals affirmed the dismissal based on the DeAtleys' 1992 bankruptcy. Should this Court accept review and ultimately reverse dismissal, respondents request this Court to remand the action to the Washington State Court of Appeals for resolution of those issues raised in respondents' cross appeal prior to any remand to the trial court.

D. Respondents are entitled to an award of attorney fees and costs.

The 1988 Agreement provides as follows:

> 13. In the event any suit or action shall be instituted under this Agreement, . . . *the prevailing party in such suit or action shall be entitled to reasonable attorneys fees, together with such other assessable costs.*

(CP 1407-11)(emphasis added).

All of the claims presented on this appeal arose from the 1988 agreement. The trial court and the Washington Court of Appeals both awarded fees and costs to respondents as the prevailing party. If this Court denies review, respondents should be entitled to an award of attorney fees and costs from this Court.

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions

> of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> . . .
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 4.84.330. If this Court denies review, that denial will be the final judgment in this case, in favor of respondents.

> Under Washington law, for purposes of a contractual attorneys' fees provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute.

Seattle First Nat. Bank v. Washington Ins. Guar. Ass'n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). There is no dispute that petitioners' entire case, including this appeal, arose out of the 1988 Agreement. All of petitioners' claims rested on the notion that respondents breached the 1988 Agreement damaging petitioners. Pursuant to state statute, the award of fees under the contract is mandatory. Accordingly, respondents should be awarded recovery of their reasonable fees and costs in responding to the Petition for Review.

CONCLUSION

For the foregoing reasons, Respondents request that this Court deny the DeAtleys' Petition for Writ of Certiorari.

Respectfully submitted,

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I Alan DeAtley, am assigning
The contract agreement between Alan & Debra
DeAtley and Layne + Marlene Barnett
Dated 1988 land 86 ac / culvert / Roadway to
AD3 Company along with all rights that
are with in the contract, AD3 Company
will finish all parts that may be left
owing to Barnett (Roadway wise)

Alan DeAtley

Alan DeAtley
for the community property
of Alan & Debra DeAtley